

Before the
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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| <i>In the Matter of</i> |) | CH Docket No. 02-278; DA 05-1346 |
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| AMERICALL GROUP, INC.; AMERICAN |) | |
| BANKERS ASSOCIATION; AMERICAN |) | |
| FINANCIAL SERVICES ASSOCIATION; |) | |
| AMERICAN RESORT DEVELOPMENT |) | |
| ASSOCIATION; AMERICAN TELESERVICES |) | |
| ASSOCIATION; ANSWERNET NETWORK; |) | |
| CCADVERTISING; CANCER RECOVERY |) | |
| FOUNDATION OF AMERICA; DIRECT |) | |
| MARKETING ASSOCIATION; EFFECTIVE |) | |
| TELESERVICES; INFOCISION MANAGEMENT |) | |
| CORP.; KIDS WISH NETWORK; MULTIPLE |) | |
| SCLEROSIS ASSOCIATION OF AMERICA; |) | |
| NATIONAL CHILDREN’S CANCER |) | |
| SOCIETY; NOBLE SYSTEMS CORP.; |) | |
| NORTHWEST DIRECT MARKETING; |) | |
| NPS; OPTIMA DIRECT; SITEL CORP.; |) | |
| SOUNDBITE COMMUNICATIONS, INC.; |) | |
| SYNERGY SOLUTIONS, INC.; |) | |
| TELE-RESPONSE CENTER, INC.; TELETECH |) | |
| HOLDINGS, INC.; TPG TELMANAGEMENT, |) | |
| INC.; AND WEST BUSINESS SERVICES CORP. |) | |

Petition for Declaratory Ruling that the
FCC has Exclusive Regulatory Jurisdiction
Over Interstate Telemarketing

The Heritage Company, located at 2402 Wildwood Avenue, Suite 500, Sherwood, Arkansas 72120, hereby submits comments to the Federal Communications Commission (FCC) regarding the Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing filed by Americall Group, Inc., American Bankers Association, American Financial Services Association, American Resort Development Association, American Teleservices Association, AnswerNet Network, ccAdvertising, Cancer Recovery Foundation of America, Direct Marketing Association, Effective Teleservices, Infocision Management Corp., Kids Wish Network, Multiple Sclerosis Association of America, National Children’s Cancer Society, Noble Systems Corp., Northwest Direct Marketing, NPS, Optima Direct, SITEL Corp., SoundBite Communications, Inc., Synergy Solutions, Inc., Tele-Response Center, Inc., TeleTech Holdings, Inc., TPG TeleManagement, Inc., and West Business Services Corp. (hereafter referred to as “Joint Petitioners”).

We support Joint Petitioners' petition of the Commission to exercise its own authority to categorically preempt state regulations of interstate telemarketing calls for the reasons described below:

1. There is a simple constitutional reason for FCC to take the position that the federal government, not the several states, should regulate interstate telemarketing:
 - a. Article I, Section 8 of the US Constitution reads, in part: "The Congress shall have Power To...regulate Commerce with foreign Nations, and among the several States..." Clearly, the Constitution grants the authority to regulate interstate commerce to the federal government.
 - b. The Federal Telephone Consumer Protection Act of 1991 - U.S Code - 47 USCA § 227 (a) (3) reads: "The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization." In this act, Congress asserted its authority to regulate interstate telemarketing, and granted the Commission the authority to regulate interstate telemarketing.
 - c. The Tenth Amendment to the US Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
 - d. Since the Constitution grants Congress the authority to regulate interstate commerce, and Congress has exercised that authority in the arena of interstate telemarketing in part through granting regulatory authority in that arena to the Commission, it is clear that the federal government is exercising an enumerated power in its regulation of interstate telemarketing. Since that authority is, in the words of the Tenth Amendment, "delegated to the United States by the Constitution", then the regulation of interstate telemarketing is a matter for federal, not state, regulation.
2. Based upon the Supremacy Clause of Article VI of the US Constitution, federal laws shall supersede state laws. Numerous precedents extend that authority of the federal government beyond statutes to include regulators' rules that implement federal legislation.
3. The states have a widely divergent set of regulations on interstate telemarketers, which Joint Petitioners make abundantly clear in their petition. Among the more egregious are:
 - a. The absence of an established business relationship (EBR) exemption to the state do not call list in Indiana.
 - b. A six-month EBR exemption for residents of Louisiana whose phone numbers are on that state's do not call registry.

- c. The absence of an exemption to do not call regulations for charities (or their third-party fundraisers) in Tennessee, Indiana, Louisiana, Alaska, and North Dakota. This point is most offensive constitutionally for reasons to be more fully described in Section 5 below.
4. The Commission pointedly stated the need for telemarketers to have regulatory uniformity July 25, 2003 when it published its Rules and Regulations implementing the Telephone Consumer Protection Act of 1991; Final Rule found in the Federal Register, 68 Fed. Reg. At6 44155, § 62, in which the Commission stated:

“We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek declaratory ruling from the Commission. We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules.”

While the Commission has accepted petitions to preempt state telemarketing regulations in a number of states (such as Indiana, Wisconsin, and Florida), this approach is both lengthy and unwieldy. The Commission’s encouragement to the states has fallen on deaf ears in the halls of state legislatures across the nation. The case-by-case approach fails to establish the uniformity that Congress desired in enacting the TCPA and other telemarketing-associated acts. It is that need and mandate for uniformity that is the basis for Joint Petitioners’ argument.

5. The Supreme Court has held repeatedly over the last 25 years that charitable organizations enjoy protected free speech rights in their fundraising campaigns. These cases, beginning with the *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) decision, and including *Secretary of State of Maryland v. J.H. Munson Company, Inc.*, 467 U.S. 947 (1984), *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), and *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc. et al.* (2003) clearly indicate that charities have a right to free speech.
 - a. The Commission, as well as the Federal Trade Commission (FTC), recognized the protected nature of nonprofit speech in specifically exempting nonprofits from the National Do Not Call Registry.
 - b. North Dakota’s do not call list has been overturned in federal court on the basis of its discrimination against the protected free speech rights of charities. That decision, *Fraternal Order of Police, North Dakota State Lodge and Veterans of Foreign Wars – Department of North Dakota v. Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota*, Civil File A3-03-74, (October 17, 2003) is on appeal currently, but the court used the Supreme Court’s decisions listed in Section 5 above as the basis for its ruling.

- c. As a third-party fundraiser for over 170 nonprofits across the nation, some of whom are among the Joint Petitioners, we are less efficient and effective in our efforts to raise money for and educate the public about our charity partners than we could be due to the states' regulatory irregularities, inconsistencies, and abuse of nonprofits' rights to free speech. We know from direct experience that these varying rules are literally keeping money away from nonprofits that do tremendous philanthropic work. The Commission has recognized the free speech rights of nonprofits by exempting them from the National Do Not Call Registry (as appropriate, given the definition of a "telephone solicitation" at the outset of the TCPA, as described in section 1b above), and by asserting its proper authority to be the exclusive regulator of interstate telemarketing, it would further protect nonprofit speech.
6. For all of the reasons above, we encourage the Commission to issue a declaratory ruling that it has exclusive regulatory jurisdiction over interstate telemarketing, as described in the petition from Joint Petitioners.

We appreciate the opportunity to publicly submit comments on these important rules affecting the teleservices industry.

For the company,

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